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# The Protection of Intellectual Property in Brazil

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# The Protection of Intellectual Property in Brazil

*Michael A. Ugolini*

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## I. Introduction.

In 1993, the Office of the United States Trade Representative (USTR) initiated an investigation of Brazil's intellectual property laws and practices<sup>1</sup> under Section 301 of the Trade Act of 1974<sup>2</sup> and identified it as a Priority Foreign Country (PFC) under Special 301.<sup>3</sup> After the consultations which followed, during which Brazil indicated that it had undertaken a number of actions to improve the protection of intellectual property, the investigation was terminated and Brazil's identification as a PFC was revoked. Due to a lack of progress, however, in April 1995 Brazil was placed on the Priority Watch List.

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- 1 See Office of United States Trade Representative, *Report to Congress on Section 301 Developments Required By Section 309(a)(3) of the Trade Act of 1974* (Mar. 31, 1998), p. 20.
  - 2 See 19 U.S.C. § 2411 (1994), as amended by The Trade and Tariff Act of 1984, Pub. L. No. 98-573, 98 Stat. 2948. Section 301 provides that foreign government acts, policies, or practices that violate trade agreements with the United States, or that are unjustifiable, unreasonable, or discriminatory, and that burden or restrict U.S. commerce, may be subjected to trade sanctions. *See id.*
  - 3 See 19 U.S.C. § 2242 (1994), as amended by The Omnibus Trade and Competitiveness Act of 1988, Pub. L. No. 100-418, 102 Stat. 1107. "Super 301" directs the U.S. Trade Representative to identify countries that deny adequate and effective protection of intellectual property rights or deny fair and equitable market access to U.S. persons that rely upon intellectual property protection, and to make annual reports to the President and to Congress. *See id.*
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When Brazil enacted industrial property laws,<sup>4</sup> Brazil was moved from the Priority Watch List to the Watch List. Brazil was kept on the Watch List during the 1997 Special 301 Review, and the USTR continues to monitor Brazil's progress with a review every two years. Brazil also recently enacted new copyright<sup>5</sup> and computer software laws.<sup>6</sup> The purpose of this article is to review the major provisions of Brazil's new laws.

## II. Brazil's New Intellectual Property Laws.

### A. COPYRIGHT.

In defining the works protected, Brazil's new copyright laws do not make any drastic changes to the laws that they repealed, but they do use language that more closely tracks that of the Berne Convention.<sup>7</sup> The economic rights of the author protected by the Act are the exclusive right to exploit or license the exploitation of the protected work in any form, including any translation or adaptation of the original.<sup>8</sup> The author also maintains the exclusive right to reproduce the work.<sup>9</sup> In addition, the author has the exclusive right to publicly communicate the work in any form, including the right of recitation, representation, and performance, the right of broadcasting, and the right of communicating the work by means of sound or visual recording.<sup>10</sup> The moral rights of the author pro-

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4 See Law No. 9.279 of 14 May 1996, Le: Da Propriedad Industrial [hereinafter Law No. 9.279]. It replaced Law No. 5.772 of 21 Dec. 1971 L.P.I.

5 See Law No. 9.610 of 19 Feb. 1998, La Da Directo Autoral [hereinafter Law No. 9.610]. It replaced Law No. 5.988 of 14 Dec. 1973 [hereinafter Law No. 5.988].

6 See Law No. 9.609 of 19 Feb. 1998, Le: De Programma De Computador [hereinafter Law No. 9.609]. It replaced Law No. 7.646 of 12 Dec. 1987 [hereinafter Law No. 7.646].

7 See Law No. 9.610, *supra* note 5, art. 7. Translations and adaptations of works in the public domain are also protected. See *id.* art. 14.

8 See *id.* arts. 28 & 29.

9 See *id.* art. 33.

10 See *id.* art. 68. The new law recognizes "fair use" by providing that the following acts do not offend the author's rights:

1. The reproduction of protected works in news articles and reviews appearing in newspapers or periodicals, with attribution of the source of the work and identity of the author;
2. The reproduction of speeches made at public meetings of any nature, in newspapers or periodicals;
3. The reproduction of parts of protected works if done for private use and without the intention of profit;
4. The reproduction of parts of protected works in books, periodicals, magazines or other media, for purposes of study and comment, with attribution of the source of the work and identity of the author.

*Id.* art. 46.

The U.S. copyright statute permits "fair use" for purposes of criticism, comment, news reporting, teaching, scholarship, or research, determined by a consideration of:

- (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
  - (2) the nature of the copyrighted work;
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ected by the Act include: the right to be recognized as the author of the work, the right to object to modifications or to other acts which harm the author's reputation or honor, and the right to remove the work from public circulation.<sup>11</sup> The author's economic rights are protected for a period including his life plus seventy years,<sup>12</sup> while moral rights are inalienable and may not be renounced.<sup>13</sup>

Registration is not required for protection.<sup>14</sup> However, authors may register their works, as appropriate, in the Brazilian National Library, the School of Music or School of Fine Arts of the Federal University of Rio de Janeiro, the National Institute of Cinema, or the Federal Council of Engineering, Architecture, and Agronomy.<sup>15</sup>

The new laws give the copyright holder a cause of action for damages against anyone who engages in the unauthorized copying of a protected work, measured by the price received for the copies he has sold.<sup>16</sup> If the number of copies sold cannot be determined, the infringer must pay the copyright owner the value of 3000 copies beyond the number of copies seized.<sup>17</sup> In addition, copyright owners have the right to have infringing works seized and any further distribution enjoined.<sup>18</sup> Any illegal copies may be destroyed, as may the instruments of their manufacture.<sup>19</sup> If the infringement concerns a work, the rights to which have been transferred to a copyright association that fixes and collects the royalty payments, the infringer must pay damages measured by twenty times the amount of the royalty.<sup>20</sup>

Rather than treat computer software as other copyrightable works, as is the practice in the United States, Brazil has enacted separate computer software copyright laws. Brazil's old computer software copyright laws<sup>21</sup> arguably violated both the TRIPS Agreement and the Berne Convention because they protected software for twenty-five years<sup>22</sup> rather than the fifty-year

- (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

- (4) the effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107 (1994).

11 See Law No. 9.610, *supra* note 5, art. 24.

12 See *id.* art. 41. Under the old law, the period of protection was the life of the author plus 60 years. See Law No. 5.988, *supra* note 5, art. 42. In the case of anonymous or pseudonymous works, and audiovisual or photographic works, the period of protection under the new law is 70 years from January 1 of the year following the year of publication. See Law No. 9.610, *supra* note 5, arts. 43 & 44. The TRIPS Agreement provides that "Members may, but shall not be obliged to, implement in their law more extensive protection than is required by [the TRIPS Agreement]." Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter WTO Agreement], Annex IC, art. 1(1), Legal Instruments—Results of the Uruguay Round vol. 31; 33 I.L.M. 81 (1994)[hereinafter TRIPS Agreement].

13 See Law No. 9.610, *supra* note 5, art. 27.

14 See *id.* art. 18.

15 See Law No. 5.988, *supra* note 5, arts. 19 & 17. If registration is appropriate at more than one place, the work should be registered in the place with which it has the greater affinity. See *id.*

16 See Law No. 9.610, *supra* note 5, art. 103.

17 See *id.*

18 See *id.* arts. 102 & 105.

19 See *id.* art. 106.

20 See *id.* art. 109.

21 See Law No. 7.646, *supra* note 6.

22 See *id.* art. 3.

term required by both conventions.<sup>23</sup> Additionally, they were vague about protection for source code.<sup>24</sup> The new laws define computer software as "the expression of an organized set of instructions, in natural or codified language, fixed in any tangible medium of expression, which enables machines, devices, instruments and peripheral equipment to process information, in a digital or an analogous form, or to function for particular purposes."<sup>25</sup>

Authors of computer programs are given few moral rights, limited to the right to be recognized as the author of the work and the right to object to unauthorized alterations which harm the author's reputation or honor.<sup>26</sup> Protection is provided for a period of fifty years from creation or publication,<sup>27</sup> independent of registration.<sup>28</sup> Copyright owners may register their software with Brazil's National Institute of Industrial Property.

The new law provides that software copyright owners may bring civil actions for infringement<sup>29</sup> and may be granted injunctions or damages.<sup>30</sup> Courts have the power to grant

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23 Article 10(1) of the TRIPS Agreement requires that computer programs be protected as literary works under the Berne Convention. TRIPS Agreement, *supra* note 12, art. 10(1). Article 7(1) of the Berne Convention establishes the minimum term of protection for literary works of the life of the author plus 50 years. Berne Convention for the Protection of Literary and Artistic Works, Sept. 9, 1886, last revised at Paris, July 24, 1971, and amended Oct. 2, 1979, art. 7(1); 828 U.N.T.S. 221 [hereinafter Berne Convention].

24 "Source code" refers to a set of instructions written in a standard programming language such as Pascal, and can be read by anyone familiar with the language. Reading it discloses all elements of the code, such as algorithms and programming techniques, and enables the reader to debug, modify, or update the program. Because such activities are usually the source of post-sale revenues to the software copyright owner/licensor, source code is usually not disclosed. Rather, only a machine-readable version of the program, called "object code," is disclosed. Object code is difficult for humans to read, and thus, is difficult to modify, except by use of a "decompiler." Since using a decompiler requires making a copy of the program in object code, it is necessarily an infringement.

25 Law No. 9.609, *supra* note 6.

26 *See id.* art. 2(1).

27 *See id.* art. 2(2).

28 *See id.* art. 2(3).

29 The new computer software law also recognizes "fair use" by providing that the following do not violate the rights of the owner of a computer software copyright:

1. The reproduction of a copy of the copyrighted program which has been legally acquired, and which is essential to the proper use of the program;
2. The partial quotation of the copyrighted program for educational purposes, provided that the program and its author are identified;
3. The similarity of the copyrighted program to another program, provided that the similarity involves the protected program's functional features, or results from compliance with laws, technical standards, or limitations of alternative forms for its expression;
4. The integration of the protected software and its basic features into an application or operating system which is technically indispensable to the user's needs, provided it is used exclusively by whoever undertook the integration.

*Id.* art. 6.

The U.S. copyright statute permits copying of a computer program where it is essential to the utilization of the program in conjunction with a machine, or where it is done for archival purposes. 17 U.S.C. § 117(a) (WestSupp. 1999).

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preliminary relief enjoining infringement or ordering the seizure of infringing copies.<sup>31</sup> A significant change has been made to the judicial secrecy provision of the old laws, which permitted software copyright infringement actions to be heard "in camera."<sup>32</sup> The new laws provide that the judge may conduct in camera proceedings only to prevent the disclosure of confidential information<sup>33</sup> and not to protect infringers from public embarrassment.

## B. INDUSTRIAL PROPERTY.

### 1. Trademarks.

The trademark provisions of Brazil's new industrial property laws define a "product or service mark" as a symbol used to distinguish the origin of a product or service from an identical, similar, or related product or service of different origin,<sup>34</sup> and the new laws state that "[a]ny distinctive visually perceivable signs, if not prohibited by law, shall be eligible for registration as a mark."<sup>35</sup> Trademark registration<sup>36</sup> confers on its holder the exclusive right to use the mark for a term of ten years from the date the application for registration is granted,<sup>37</sup> which may be extended for successive ten-year periods.<sup>38</sup>

An infringement is committed by any person who reproduces a mark without authorization of the owner, imitates it in a manner that may cause confusion, or alters a mark

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The new law contains several novel provisions for the protection of users. First, publishers of computer software programs must indicate in the licensing agreement or accompanying documentation the period during which the program will be valid. *See* Law No. 9.609, *supra* note 6, art. 7. Second, during the stated period of validity, the publisher or distributor is required to provide technical support in Brazil to users of the program. *See id.* art. 8. Finally, if the publisher withdraws a program from commercial circulation during the period of validity stated, it must provide indemnity for any damages caused to users of the program. *See id.*

30 *See id.* art. 14.

31 *See id.* art. 14(2), (3).

32 *See* Law No. 7.646, *supra* note 6, art. 39 (2).

33 *See* Law No. 9.609, *supra* note 6, art. 14(4).

34 Law No. 9.279, *supra* note 6, art. 123(I). Protection is also provided for "certification marks," which are used to signify compliance with quality standards and specifications, and "collective marks" which are used to identify goods or services produced by members of a certain entity or economic group. *Id.* The administrative regulations regarding the trademark registration process are contained in INPI's Normative Ruling No. 131 of 23 April 1997. *See also* Directive No. 51 on guidelines for trademark analysis.

35 Law No. 9.279, *supra* note 4, art. 22. As permitted by the Paris Convention, internationally famous marks enjoy "special protection," and an application for registration may be rejected if a mark wholly or partially reproduces or imitates a well-known mark. *Id.* art. 126(2). *See also* Paris Convention for the Protection of Industrial Property, Mar. 20, 1883, as last revised at Stockholm, July 14, 1967, art 6-bis, 21 U.S.T. 1538, 828 U.N.T.S. 305 [hereinafter Paris Convention].

36 Unlike the United States, where legal protection of trademarks is derived from use of the mark in commerce, 15 U.S.C.A. § 1051(b) (West 1997), in Brazil, all rights stem from registration, and except for the right of priority provided by the Paris Convention, no protection whatsoever is provided to an unregistered owner. *See* Law No. 9.279, *supra* note 4, art. 127. The procedure for registering a trademark based upon an "intent to use," prior to actual use, has only recently been introduced into U.S. law. Trademark Law Revision Act of 1988, Pub. Law No. 100-667, § 103, 102 Stat. 3935 (1988).

37 *See* Law 9.279, *supra* note 4, arts. 130, 133.

38 *See id.*

that has been affixed to a product placed on the market.<sup>39</sup> However, the trademark owner may not prevent merchants from using their own marks together with the owner's trademark in promoting the sale of trademarked products, prevent manufacturers of accessories from using the trademark to indicate the use for their products, control the free circulation of trademark products placed in commerce by the trademark owner or others with the owner's consent, or prevent the citation of the trademark in speech, scientific, or literary works, if done without a commercial purpose and without prejudice to its distinctive character.<sup>40</sup>

A trademark will lapse from failure of the trademark owner to use it for five years from the date of registration or if its use is interrupted for more than five consecutive years, unless such failure or interruption in use is justified.<sup>41</sup>

## 2. Patents.

In order to be patentable under Brazil's new industrial property law, an invention must meet the novelty, inventive activity, and industrial applicability requirements of the new Act.<sup>42</sup> An invention is considered "novel" when it is not the present state of the art, determined by reference to information which is publicly available prior to the date of the application, both within and without Brazil.<sup>43</sup> The second requirement of patentability is that the invention must involve an inventive act, which means that it must not be obvious to those practitioners in the field of use concerned.<sup>44</sup> Finally, the invention must have industrial applicability, which simply means that it must be capable of use in some industry or be capable of being produced by some industry.<sup>45</sup> Under Brazil's new industrial property laws, the following are not patentable: (1) discoveries, scientific theories, and mathematical models; (2) purely abstract concepts; (3) schemes, plans, principles or methods of a commercial, accounting, financial, educational, or advertising nature, or for games of chance or surveillance; (4) literary, architectural, artistic, and scientific works or any aesthetic creation; (5) computer programs *per se*; (6) data compilations; (7) game rules; (8) surgical methods and techniques as well as therapeutic and diagnostic methods having human or animal application; and (9) all or part of living beings and other biolog-

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39 See *id.* art. 189.

40 See *id.* art. 132.

41 See *id.* art. 143. The TRIPS Agreement provides for a minimum term of three years of non-use prior to cancellation. Art. 19. TRIPS Agreement, *supra* note 12, art. 19.

42 See Law No. 9.279, *supra* note 4, art. 8. The cognate requirements of U.S. law are that the invention must be "new," "non-obvious," and "useful." 15 U.S.C.A. §§ 101, 103. The administrative regulations regarding the patent registration process are contained in INPI's Normative Ruling No. 127 of 5 March 1997.

43 See *id.* art. 11. Excepted from the definition of "publicly available" is that information contained in the application for registration, and that information contained in prior applications for registration made during the 12 months preceding the application and having as its source: (1) the inventor; (2) an official publication of the National Institute of Industrial Property if its source of the information is the inventor; or (3) third parties, whose source is the inventor. Art. 2.

44 See *id.* art. 13.

45 See *id.* art. 15.

ical substances found in nature, or isolated from it, including the "genome" or "germoplasma" of any natural living being and its natural biological processes.<sup>46</sup>

A patent registered in Brazil confers on its holder the exclusive right to make, use, or sell the patented invention for a term of twenty years from the date of filing of the application for registration.<sup>47</sup> This is consistent with the minimum term of protection required by the TRIPS Agreement.<sup>48</sup>

Regarding remedies, the industrial property law provides that the owner of a registered trademark or patent may institute civil proceedings against an infringer<sup>49</sup> and recover all damages caused by the infringement,<sup>50</sup> including lost profits.<sup>51</sup> Lost profits may be determined by reference to the benefits the owner would have obtained if the infringement had not taken place, the benefits received by the infringer, or the remuneration the infringer would have had to pay the owner for a license.<sup>52</sup> In addition, the trademark or patent owner may obtain preliminary injunctive relief,<sup>53</sup> and, in cases of reproduction or imitation of a registered mark, the seizure of all articles bearing the falsified or imitated mark.<sup>54</sup>

While the new laws provide that the National Institute of Industrial Property (INPI) may grant a nonexclusive license to a third party where the patent holder exercises his rights in an abusive manner or abuses his economic power under Brazilian law,<sup>55</sup> they also permit the INPI to grant a nonexclusive license to a third party where the patent holder fails to work the patent in Brazil<sup>56</sup> within three years of registration,<sup>57</sup> unless doing so is economically unfeasible. The INPI may also grant a nonexclusive license to a third party where the patent holder fails to satisfy demand for the patented product in Brazil<sup>58</sup> within three years of registration.<sup>59</sup> It is open to the patent holder, under the new laws, to show that such failures are justified by legitimate reasons,<sup>60</sup> legal impediments,<sup>61</sup> or that serious and effective preparations for exploitation have been made.<sup>62</sup>

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46 See *id.* art. 10. The new law provides protection for chemicals, pharmaceuticals and food products, which were not patentable under the old law. Law No. 5772 of Dec. 21, 1971, Art. 9.

47 See *id.* art. 40.

48 TRIPS Agreement, *supra* note 12, art. 33..

49 See Law No. 9.279, *supra* note 4, art. 207.

50 See *id.* art. 208.

51 See *id.* art. 196.

52 See *id.* art. 210.

53 See *id.* art. 209(1).

54 See *id.* art. 209(2).

55 See *id.* art. 68. This is consistent with the TRIPS Agreement. See TRIPS Agreement, *supra* note 12, art. 31(k).

56 See Law No. 9.279, *supra* note 4, art. 68(1)(I) and (5).

57 See *id.* art. 68(5).

58 See *id.* arts. 68(1)(I) and (II).

59 See *id.* art. 68(5).

60 See *id.* art. 69(I).

61 See *id.* art. 69(III).

62 See *id.* art. 69(II). If any of these excuses for failing to work the patent in Brazil or satisfying demand in Brazil are made out, importation of the patented product by the patent holder will be permitted. If they are not made out, the grant of a compulsory license may give the licensee the right to import the product into Brazil. See *id.* art. 68(4).

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### III. The Importation of Counterfeit, Pirated, and Otherwise Infringing Goods.

The TRIPS Agreement<sup>63</sup> requires that World Trade Organization (WTO) member countries adopt "border measures," that is, they are required to adopt procedures under which a right holder who suspects that the importation of counterfeit trademark<sup>64</sup> or pirated copyright goods<sup>65</sup> may take place, may lodge an application with administrative or judicial authorities for the suspension by the customs authorities of the release into free circulation of such goods.<sup>66</sup> The TRIPS Agreement, however, creates no obligations to prohibit the importation of gray-market goods.<sup>67</sup> While it specifically provides that WTO member countries that are also members of a customs union need not adopt "border measures" at borders with other countries that are members of the same customs union,<sup>68</sup> it also provides that WTO member countries need not adopt "border measures" as to "goods put on the market in another country by or with the consent of the right holder."<sup>69</sup> As to the infringement of other kinds of intellectual property rights, for example, patents or trade secrets, adopting such "border measures" is elective.

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63 See TRIPS Agreement, *supra* note 12. The WTO Agreement is the culmination of multilateral trade negotiations that took place between 1986 to 1994, referred to as the "Uruguay Round" of negotiations under the General Agreement on Tariffs and Trade General Agreement on Tariffs and Trade, Oct. 30, 1947, T.I.A.S. 1700, 55 U.N.T.S. 187 [hereinafter GATT]. Besides the United States, the contracting parties to the GATT were Australia, Belgium, Brazil, Burma (now Myanmar), Canada, Ceylon, Chile, the Republic of China, Cuba, Czechoslovakia, France, India, Lebanon, Luxembourg, the Netherlands, New Zealand, Norway, Pakistan, Southern Rhodesia, Syria, South Africa, and the United Kingdom. The purpose of the WTO Agreement is to continue the development of the multilateral framework for international trade begun under the GATT, which, during the first five negotiating rounds, had focused on tariff barriers, and which, during the last three, had begun to focus on non-tariff barriers such as dumping (the Tokyo Round 1973-1979); customs valuation, subsidies, technical barriers, import licensing, and government procurement (the Kennedy Round 1964-1967); and which, during the Uruguay Round, had begun to focus on services, intellectual property, dispute settlement, agriculture, textiles, sanitary and phytosanitary measures, technical standards, and rules of origin. See John H. Jackson, *THE URUGUAY ROUND AND THE LAUNCH OF THE WTO: SIGNIFICANCE & CHALLENGES*, excerpted from *THE WORLD TRADE ORGANIZATION: THE MULTILATERAL TRADE FRAMEWORK FOR THE 21ST CENTURY AND U.S. IMPLEMENTING LEGISLATION*, (Terence P. Stewart, Ed. (A.B.A. 1996)).

64 "Counterfeit trademark goods" are defined as goods bearing without authorization a trademark which is identical to the trademark validly registered in respect of such goods or which cannot be distinguished in its essential aspects of such a trademark, and which thereby infringes [sic] the rights of the owner in question under the law of the country of importation. See TRIPS Agreement, *supra* note 12, art. 51, N.14.

65 "Pirated copyright goods" are defined as goods that are copies made without the consent of the right holder or person duly authorized by the right holder in the country of production and that are made directly or indirectly from an article where the making of that copy would have constituted an infringement of a copyright or a related right under the law of the country of importation. *Id.*

66 See *id.* art. 51.

67 See *id.*

68 See *id.* art. 51, n.12.

69 *Id.* art. 51, n.13.

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Brazil's new copyright and computer software copyright laws are both silent about the availability of "border measures" for pirated copyright goods as required by the TRIPS Agreement. Therefore, they are not in compliance with the TRIPS Agreement. Its new trademark laws provide that it is an infringement for a person to import a product bearing a mark that has been unlawfully reproduced or imitated.<sup>70</sup> The new trademark laws further provide that customs authorities may seize goods or products bearing falsified, altered, or imitated marks at the request of the trademark owner or on its own initiative.<sup>71</sup> The trademark sections of Brazil's new industrial property laws are, therefore, in compliance with the TRIPS Agreement, at least as to the availability of "border measures" for counterfeit trademark goods.

Brazil's new industrial laws prohibit anyone but the patent holder from importing a product that is patented in Brazil or that is produced by means of a process patented in Brazil, *provided the product has not been introduced into markets outside of Brazil by the patent holder or by others with his consent.*<sup>72</sup> This would seem to violate the TRIPS Agreement, which confers on a patent holder the right "to prevent third parties not having the owner's consent from the act[ ] of . . . importing . . . that product."<sup>73</sup> While this right "is subject to the provisions of article 6,"<sup>74</sup> and Article six provides that nothing in the TRIPS Agreement shall be used to address the issue of the "exhaustion of intellectual property rights" to provide for what is essentially a forfeiture of the patent when the patent holder markets the patented product outside of Brazil reflects a novel and expansive notion of the doctrine of exhaustion.

#### IV. Conclusion.

While Brazil has made a laudable attempt at bringing its intellectual property laws up to world standards, its new copyright and computer software laws fall short in important respects, as neither make any mention of "border measures" to protect right holders from the importation of pirated copyright goods. While the trademark provisions of its new industrial property laws are in substantial compliance with the TRIPS Agreement, its patent provisions are not, particularly in their failure to protect against infringing imports under the guise of the "exhaustion" of intellectual property rights.

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70 See Law No. 9.279, *supra* note 4, art. 190(1).

71 See *id.* art. 198.

72 See *id.* art. 184(II).

73 *Id.* art. 28(1).

74 *Id.* art. 28(1), n.6.

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Rather than take unilateral measures against Brazil, the USTR should invoke the dispute resolution procedures of the WTO at the earliest possible moment.<sup>75</sup> While unilateral measures have been effective in opening many markets to U.S. products,<sup>76</sup> they have not been entirely satisfactory. Again, to take Brazil as an example, despite all of the activity by the USTR described in the introduction, Brazil's intellectual property laws continue to provide a basis for dispute. Resort to unilateral measures only invites unilateral counter-measures and encourages disrespect for the rules-based system that the WTO was supposed to have established.

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75 No WTO member is obligated to apply the TRIPS Agreement before one year after the WTO Agreement is in effect in that member country, although nothing prevents any member from assuming its obligations at an earlier date. See TRIPS Agreement, *supra* note 12, art. 65(1). Developing countries and countries in the process of transformation from centrally planned into market, free-enterprise economies are entitled to delay their obligations for a further period of four years. See *id.* Article 65(2)(3). Since the WTO Agreement went into effect in Brazil on January 1, 1995, Decree No. 1355 (Dec. 30, 1994), and Brazil is a developing country, Brazil is not obligated to apply the TRIPS Agreement until January 1, 2000. The TRIPS Agreement neither names or defines nations that are "developing," and countries follow the established GATT practice of self-designation. Least-developed countries need not apply the TRIPS Agreement until 10 years after the WTO Agreement is in effect in that member country. See TRIPS Agreement, *supra* note 12, art. 66(1).

76 Judith H. Bello & Alan F. Holmer, *U.S. Trade Law and Policy Series No. 24: Dispute Resolution in the New World Trade Organization: Concerns and Net Benefits*, 28 INT'L LAW. 1095 (1994).

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